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No. 83-1166

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

PAUL SILVER and DONALD W. PARKER,
Petitioners,
v.
JOHN C. BENSON, JR., *et al.*,
Respondents.

On Writ of Certiorari to the Commonwealth Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF COUNTIES AND THE NATIONAL LEAGUE OF CITIES IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court of the United States, the U.S. Conference of Mayors, the National Association of Counties and the National League of Cities hereby move for leave to file a brief *Amici Curiae* in the above-captioned proceedings, and in support thereof state:

1. The decision of the Commonwealth Court of Pennsylvania, in imposing an audit surcharge of $35,743.23 on Petitioners who, as elected officials and in clear furtherance of the interest of the township they represent,

petitioned the State legislature for a statutory change affecting the township, will have a deleterious and chilling effect on local elected officials throughout the United States.

2. The decision will have far reaching consequences for the cities and counties of America which need to have their interests represented in State and Federal legislative councils and which can only be represented by elected and appointed officials of such cities and counties acting in the due course of their public duty.

3. The decision in this case will undermine the responsiveness of elected officials of local governments to the needs of their constituents, at least to the extent that those needs should be presented to State and Federal government officials.

4. If some (or all) First Amendment protections are unavailable to municipal corporations themselves, cities and counties will be put at a substantial disadvantage in their representation of the collective interests of their citizens in the "public marketplace of ideas."

5. This case presents important issues of law of direct and immediate concern to the members of *Amici*, the nation's counties and cities.

6. Accordingly, *Amici* seek this opportunity to make known their views to the Court and to attempt to assist the Court in its decision on the Petition for Certiorari.

7. Counsel for *Amici* has sought, but was unable to secure, consent to file the attached brief *Amici Curiae* from Respondent.

Counsel for *Amici* hereby requests that the Court grant this Motion to File the brief *Amici Curiae* of the United States Conference of Mayors, the National Association of Counties and the National League of Cities and

that the attached brief be accepted as part of the record in this case.

Respectfully submitted,

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BRIEF AMICI CURIAE OF THE UNITED STATES CONFERENCE OF MAYORS, THE NATIONAL ASSOCIATION OF COUNTIES AND THE NATIONAL LEAGUE OF CITIES IN SUPPORT OF PETITIONERS

IDENTITY AND INTEREST OF THE AMICI CURIAE

Amici, the United States Conference of Mayors, the National Association of Counties and the National League of Cities are the national membership organizations of the nation's cities and counties. The Conference was organized during the Great Depression to promote the causes of the cities and to foster responsible, informed and effective relationships between city halls and the

Federal Government. By limiting its membership to cities of over 30,000 in population, the Conference represents the needs of larger cities. Of the 800 cities eligible for membership in the Confernce, over 480 are full members, including virtually all cities of over 100,000 in population.

The National Association of Counties is the only national organization representing county government in the United States. Its membership spans the spectrum of urban, suburban and rural counties which have joined together for the common purpose of strengthening county government. NACo member county governments cover over 85% of the U.S. population.

The National League of Cities (NLC) was founded in 1924 by reform minded State Municipal Leagues and constitutes a national organization representing municipal interests before Congress and the Administration. Its membership includes direct member cities, state municipal leagues and state league member cities. In all, almost 15,000 cities and municipalities, both large and small, are members of and participate in the activities of NLC. NLC is particularly concerned over the impact of the decision below on very small municipalities, many of which are represented by part-time, "citizen" legislators.

In addition to their concern over the substantial effect the decision below will have on Petitioner elected officials and on the township, *Amici* are troubled that local governments in all parts of the United States will find themselves subject to novel questions regarding their rights to participate, through their elected officials in political processes affecting their everyday existence. Of equal importance, elected officials of those government entities, cognizant of the grievous consequences that have fallen on the Petitioners for their good faith, "laudable," activities on behalf of their constituents, almost certainly will be deterred from the vigorous exercise of their pub-

lic obligations for fear of facing similar, Draconian results.

The decision below, in combination with the reservation of the question of the First Amendment rights of municipalities in *City of Boston v. Anderson*, 439 U.S. 951, 439 U.S. 1389, *dismissed for want of a substantial Federal question*, 439 U.S. 1060 (1978), can only fuel the uncertainty of municipal officials in their efforts to implement public policy. Fear of personal liability for activities such as those found in this case (undertaken with advice of counsel and in furtherance of a clear and relevant public purpose) will serve to discourage conscientious citizens from seeking public office where the financial rewards are so often so meager and the potential for personal liability is so great.

This Court's plenary review of the decision below would clarify for cities and counties and their elected officials the permissible ambits of their First Amendment activities. Mayors, and city and county officials need the guidance of this Court. Accordingly, *Amici*, the U.S. Conference of Mayors, the National Association of Counties and the National League of Cities urge that the Court grant the Petition for Certiorari in this case.

SUMMARY OF ARGUMENT

The Commonwealth of Pennsylvania has surcharged Petitioner elected township officials for all expenses incurred by the township in moving an amendment concerning the zoning powers of the township through the State legislature. The trial court found that the Petitioners acted in good faith. The Commonwealth Court characterized the type of activity engaged in by Petitioners as "laudable." The case raises disturbing First Amendment questions as to the rights of both elected officials to represent the collective interests of their constituents, and of municipal corporations, themselves, to

be heard in legislative deliberations concerning their authority.

1. Unless municipal corporations, themselves, have First Amendment rights to petition the State legislature and to exercise Freedom of Speech, it is likely that their voices will not be heard on matters of public concern. The only real choice available to Petitioners, other than the one they chose, was to remain silent, both on their own behalf and on behalf of the township. If the Petitioners were to have used their own funds to engage in lobbying, there could be no assurance or check that they would properly be representing the interests of the municipality; in fact, such expenditures by public officials tread on the limits of conflict-of-interest. The silence of elected officials and of the municipality constitutes a loss of major proportions to the public debate of issues of direct and immediate concern to the officials in their representative capacity, and to the municipality. This case raises important questions on the dependent nature of the exercise of First Amendment rights by municipal corporations and the elected officials who are sworn to protect the interests of municipalities.

2. This case also raises novel questions of the application of other First Amendment doctrines to public officials and the cities and counties they serve. To the extent that the ability of cities and counties to petition their State legislatures is impaired by the decision below, how are such local governments going to be able faithfully to carry out the obligations imposed on them by Federal and State constitutions and laws?

ARGUMENT

I. FIRST AMENDMENT RIGHTS ARE SO FUNDAMENTAL TO THE CONDUCT OF THE PUBLIC'S BUSINESS THAT THE IMPAIRMENT OF THOSE RIGHTS OF ANY PARTICIPANT IN SOCIETY, INCLUDING MUNICIPAL CORPORATIONS, WILL SERIOUSLY ERODE THE FREE DISCUSSION OF GOVERNMENTAL AFFAIRS.

A. Petitioners in this case as elected officials of a township in rural Pennsylvania undertook a lobbying effort on behalf of the township for the passage of state legislation affecting the township's zoning procedures. The township's auditors questioned the legal basis for the expenditure of public funds by the Petitioners for these activities, but decided not to surcharge the officials. Certain township taxpayers then appealed the decision of the auditors to the Court of Common Pleas which, despite finding that the Petitioners had "acted in good faith and without fraud in spending township funds for what they thought was a proper public purpose," surcharged the Petitioners, jointly and severally in the amount of $35,743.23. (A-13)[1]

The Commonwealth Court of Pennsylvania affirmed on appeal on the ground that the expenditures were not budgeted properly. In so holding, however, the Court noted the importance of local government participation in the state legislative process and gave its view that local government lobbying "is in no sense evil or pernicious; in most cases, it is probably laudable." (A-4). Petitioners' sole compensation for holding public office is that they are reimbursed $25.00 per township meeting they attend. (P-i).

The question presented, as taken from the Petition for Certiorari, is whether municipal corporations, when

[1] References to the Petition for Writ of Certiorari and the attached Appendix will be made as (P-) and (A-), respectively.

speaking on matters concerning their governmental responsibilities, are themselves endowed with First Amendment rights comparable to those possessed by private corporations under *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (P-i).

B. There are no more cherished values found in the Federal Constitution than the freedom of speech and the right to petition government, both embodied in the First Amendment. Protection of these liberties is elementary to the proper operation of a political system based on law and reasoned discourse.

> The maintenance of the opportunity for free political discussion to the end that the government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

It is an axiom of First Amendment law that "a major purpose of [the First] Amendment was the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). In the case at bar, Petitioners, on behalf of their township, approached the State legislature with proposals for statutory amendments directly affecting the zoning code of the township. Surely, these efforts constitute "discussion of governmental affairs."

It is indisputable that if the Petitioners had used their own funds to lobby on behalf of the township, their speech would have been protected. However, because they spoke for a municipal corporation, and expended the funds of that corporation, they are being surcharged significant sums for petitioning the legislature and engaging in political discussions. In *Bellotti*, *supra*, the Court observed that "If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech." 435 U.S. at 777. What alternatives were available to Petitioners, then, that

would permit them to engage in the protected speech and to speak out on behalf of their constituents? Each other course of action degrades First Amendment rights.

Petitioners could have chosen to remain silent on the zoning code legislation. Such silence, however, could have been questioned as a breach of their public duty to represent the concerns of the citizens on a matter of direct, immediate and important effect on the township. In addition, it is only in rare instances that silence is the most meaningful exercise of freedom of speech. It is a rare instance indeed, when silence is an effective tool in moving favorable legislation through a State house or the Congress. The ultimate effect of Petitioners' silence would be that the township's concerns would not be voiced in the public debate.

Petitioners could have chosen to expend their own funds on behalf of the township. Several problems plague this choice. First, legislative action, as demonstrated in this case, is an expensive business. Where were the Petitioners to find the resources required to wage this campaign on behalf of the township? Second, and more important, is the question of the appropriateness of asking elected officials to use personal funds to represent the electorate. Local governments should not have to hope for the election of the wealthy to public office for their concerns to be presented in public settings. It would be troubling if municipalities were dependent on the largesse of elected officials to insure their equal participation in the public debate.

And, personal payment by elected officials may serve to deter citizen participation in local government. The burdens may simply be too great. Just last term this Court stated that one of its responsibilities "is to ensure that citizens are not deprived of fundamental rights by virtue of working for government. . . ." *Connick v. Myers*, —— U.S. ——, 75 L.Ed.2d 708, 720 (1983). In fact, to the extent that elected officials have an obligation faithfully

to execute the duties of their public office, any requirement that they do so out of personal funds raises the spectre of forcing them to "relinquish their First Amendment rights as a condition of public employment." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), and *Connick, supra*, at 726. (Brennan, J., dissenting.)

One final difficulty with the use of personal funds to represent municipal corporate concerns is that questions will arise over the exact nature of the interest being represented. It is doubtful that it is in the best interest of governmental entities to permit officials, cloaked with the apparent authority of elected governmental office, to spend unreported, untraceable and, possibly, unlimited amounts of private funds in seeking legislation arguably of value to the entity. At least the expenditure of public funds requires that the funds be accounted for in a public forum, subject to public scrutiny. As the facts of this case amply demonstrate, the citizens of Buckingham Township were well aware of the expenditure of public funds for lobbying, from the public meeting held to discuss the legislative effort (P-15, n.13), to the bringing of this case. Once the citizens and taxpayers became aware of this expenditure, the question became a political one, and the proper resolution of the dispute should have been at the ballot box, not by the use of the surcharge.

The other choice arguably available to Petitioners was that they could have complied with the law of Pennsylvania by budgeting the funds as suggested by the Commonwealth Court (A-5). However, as demonstrated by Petitioners, (P-14, n.13), it was impossible under State law for the township budget to be amended during the pendency of the legislation; in fact, the legislation supported by the township was adopted within a single budget year. Under this alternative the Petitioners would have had to have remained silent in the legislative deliberations while they waited for the budget year to catch up with them. Any State procedure which puts

such constraints on the exercise of First Amendment rights should be subject to strict scrutiny. *Freedman v. Maryland*, 380 U.S. 51 (1965), *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975). In addition, even if the Petitioners had been able to comply with the budget mandates of the State, it appears that the Commonwealth Court was not convinced that the township had "express or implied" authorization under Pennsylvania law to engage in lobbying activities. See, discussion at P-15, n.14, and A-5.

One last note on the choices available to the Petitioners: The Respondents, all other citizens of the township, as well as land developers and private corporations, (see, *First National Bank of Boston v. Bellotti, supra*) had every right to be at the State legislature, using whatever funds they deemed advisable, seeking whatever changes to the State zoning code they deemed desirable. The decision of the court below, assures that one participant, the township whose powers are the subject of the legislation, will not have equal access to the public deliberations of the legislature. "To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 176-177 (1976).

Given the choices before them, Petitioners appear to have taken the best and most expeditious path available: they used township funds to petition the State legislature on an issue of immediate concern to the township and the citizens they had sworn to serve.

C. Cities and other local governments occupy a unique place in the American system of government. "[I]n working out a legal status for cities, courts have for centuries wrestled with the question, which has perplexed liberal theorists, whether to classify cities as an exercise

of freedom by individuals or as a threat to freedom analogous to that posed by the state." Frug, "The City As A Legal Concept," 93 *Harv. L. Rev.* 1057, 1077 (1980).[2] In fact, local governments are interspersed between the State and individuals, possessing characteristics of both. "Cities are not themselves sovereign; they do not receive all the federal deference of the States that created them." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978), cf., *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), *National League of Cities v. Usery*, 426 U.S. 833 (1976).

However, even as "creatures of the State" cities and other local governments should have available to them the First Amendment rights available to private business corporations. As this Court noted in *Bellotti*,

> The Massachusetts court did not go so far as to accept appellee's argument that corporations, as creatures of the State, have only those rights granted them by the State. The court below recognized that such an extreme position could not be reconciled either with the many decisions holding state laws invalid under the Fourteenth Amendment when they infringe protected speech by corporate bodies. . . .
>
> In cases where corporate speech has been denied the shelter of the First Amendment, there is no suggestion that the reason was because a corporation rather than an individual association was involved. . . . [T]he States are [not] free to define the rights of their creatures without constitutional limit.

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[2] In this seminal article on the legal history and development of American cities, Professor Frug discusses the "series of complex dualities" that characterize our thinking about cities: sometimes they represent individuals, sometimes the State, sometimes their activities are "governmental," sometimes "proprietary," at 1075. This section will discuss the individual rights of local governments as they represent collections of individuals in contrast to their rights as corporations.

435 U.S. at 779, n.14. (Citations and references, omitted).

Municipal corporations, like private corporations, can only speak through their elected or appointed officials. Municipal officials regularly face elections, in effect, performance evaluations by the citizens, for, "the citizenry is the final judge of the conduct of public business," *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975). Because of the frequency and openness of public elections, local government officials have to be responsive to the needs and wishes of the electorate. They, therefore, may be at least as attentive to the needs of the citizenry as are corporate officials of the specific needs of shareholders. In *Bellotti, supra*, the Court relied on the fact that "the procedures of corporate democracy" were sufficient to protect the interests of shareholders in decisions by management to "engage in debate on public issues." 435 U.S. 794. Unlike the corporations in *Bellotti*, Petitioners in this case were not attempting to influence the outcome of a referendum, but, rather, were pursuing State legislation, an activity that Massachusetts did not attempt to abridge. *Bellotti, supra*, 435 U.S. at 791, n.31.

The actions of Petitioners in voicing the concerns of the township and its citizens before the State legislature on a matter of direct impact on the township should be entitled to the same First Amendment protections available to individuals and private corporations alike.

II. AS GUARDIANS OF FIRST AMENDMENT RIGHTS, AND AS PARTIES THAT ARE HELD RESPONSIBLE FOR DEPRIVATIONS OF THOSE RIGHTS, MUNICIPALITIES ARE SUBJECT TO A FANTASTIC WEB OF LEGAL OBLIGATIONS AND DUTIES TO THE CITIZENRY; MUNICIPALITIES NEED TO BE ABLE TO CLAIM SOME CORRELATIVE PROTECTION FOR THEIR ACTIVITIES UNDER THE FIRST AMENDMENT.

The discussion below will raise only a few of the questions that local government entities must face that implicate First Amendment protections. Plenary review of this case by the Court would be of enormous benefit to local government officials in their efforts to discern their responsibilities and obligations under various First Amendment settings.

A. The Pennsylvania legislature has determined that elected and appointed officials of local governments are not to be considered "lobbyists."[3] The Congress of the United States has also exempted public officials from the Federal Regulation of Lobbying Act, 2 U.S.C. § 261 *et seq.*, § 267(a). In upholding the constitutionality of the

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[3] "Lobbyist" means any natural person who:

(i) Is employed or engaged for compensation, by any other person or any partnership, committee, association, corporation or any other organization to lobby.

(ii) Makes expenditures or incurs obligations on behalf of any one person he represents in excess of three hundred dollars ($300) in any one calendar month except that a natural person shall not be considered a lobbyist when he:

(A) Formally communicates with or formally presents testimony before an agency of the Commonwealth or the General Assembly.

(B) Testifies before a committee of the General Assembly.

(C) Is an officer, official or employee of the Commonwealth of Pennsylvania or any political subdivision thereof and is acting in his official capacity. 46 Pa. Stat. Ann. § 148.2 (Supp. 1983-1984)

Federal Act, this Court found that it was proper for Congress to force disclosure by private "special interest groups seeking favored treatment while masquerading as proponents of the public weal." *United States v. Harriss*, 347 U.S. 612, 625 (1954). When public officials go to Congress, or their State legislatures, to speak on matters of local concern, they are not "masquerading as proponents of the public weal," they are the elected representatives of the public weal. The involvement of local elected officials in the day-to-day work of Congress and the State legislatures is of vital importance to the maintenance of the intergovernmental system representing cooperative Federalism. See, e.g., *Bradley v. Saxbe*, 388 F.Supp. 53, 56-57 (1975). Surely, local governments, as partners in the intergovernmental system, should have the same rights of petition as all other citizens.

The California Supreme Court has recently ruled that the right to petition government includes an absolute right to pursue litigation against local governments, and that local governments cannot bring suits for malicious prosecution against citizens. *City of Long Beach v. Bozek*, 31 Cal.3rd 527, 183 Cal.Rept. 86, 645 P.2d 137 (1982), *certiorari granted, judgment vacated and remanded for consideration as to its basis on State or Federal constitutional grounds*, January 10, 1983, 51 U.S.L.W. 3507. It would be incongruous to place undue impediments upon local governments in their efforts to petition State legislatures while, concurrently, they are absolutely required to entertain, even at considerable expense, all petitions brought to them.

B. A recent decision of this Court underscores the importance of local government access to the State legislature. In *Community Communications Corporation v. City of Boulder*, 455 U.S. 40 (1982), the Court found that local governments can only claim the benefits of the "State Action" doctrine to escape scrutiny under the

Federal antitrust laws if they are operating under "clearly articulated and affirmatively expressed" state policies to displace competition. 455 U.S. at 51. And, the majority stressed the lesson from *Parker v. Brown*, 317 U.S. 341, 350 (1943), that the State legislature is the proper forum for State review. 455 U.S. at 54.

If, as under the facts of the case at bar, governmental entities are restricted in their access to State legislatures, and, for fear of personal liability, local elected officials are reticent about approaching State legislatures, local governments will be hard pressed to secure the State immunizing legislation required by *Boulder*.

Of equal importance, in defending Sherman Act suits, if local governments do not have First Amendment protections, they may not be able to claim the benefits of the *Noerr-Pennington* doctrine to support their legislative efforts. See, *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). The doctrine is premised on the First Amendment right to petition government and provides an immunity for lobbying and other joint efforts by citizens to induce anticompetitive governmental action.

C. This section suggests some of the difficult theoretical problems that arise from the premise that local government entities have limited First Amendment rights. Local governments, and their elected officials need a clarification of the nature and extent of their rights under the First Amendment.

CONCLUSION

For all the foregoing reasons, the decision of the Commonwealth Court of Pennsylvania in this case should be reviewed by this Court.

Dated: February 15, 1984

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